

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re

HAYES STREET-GOUGH ASSOCIATES
LIMITED PARTNERSHIP,

Debtor.

Case No. 92-57448-MM

Chapter 11

**MOTION TO SEQUESTER CASH
COLLATERAL, TO DISMISS FOR BAD
FAITH, AND FOR CHANGE OF VENUE**

Before the Court are New Horizon's Motion to Transfer Venue, Motion to Dismiss Chapter 11 Proceeding, Motion for Sequestration of Cash Collateral and for Adequate Protection, Motion for Relief from Stay, and Application for Order Approving Stipulation for Retention and Compensation of State Court Receiver. Also before the Court are the Debtor's Motion to Terminate the Services of the Receiver, to Retain Property Manager, and to Use Cash Collateral, and Application to Employ Real Estate Broker and List Real Property for Sale and Lease. For the reasons that follow, the Motion to Transfer Venue, Motion to Dismiss Chapter 11 Proceeding, Motion for Sequestration of Cash Collateral and for Adequate Protection, Motion for Relief from Stay, and Application for Order Approving Stipulation for Retention and Compensation of State Court Receiver are denied, and the Motion to Terminate the Services of the Receiver, to Retain Property Manager, and to Use Cash Collateral, and Application to Employ Real Estate Broker and List Real Property for Sale and Lease are granted.

The debtor, Hayes Street-Gough Associates, filed its bankruptcy petition on October 26, 1992. The Gough-Hayes Hotel in San Francisco is the debtor's only asset. The former owner of the

1 hotel is also a chapter 11 debtor with a case pending in the bankruptcy court in San Francisco. The
2 debtor acquired the hotel by foreclosure sale pursuant to a second deed of trust held by the debtor's
3 principals prior to filing bankruptcy. The debtor's principal place of business is San Jose.

4 New Horizons holds the first deed of trust and an assignment of rents on the hotel. The
5 amount of the outstanding debt to New Horizons is over \$1.66 million. The debtor has appraised the
6 value of the property at \$2.4 million, and New Horizons has appraised the value of the property at
7 \$1.72 million. The monthly income from room rentals exceeds \$30,000.

8 A receiver appointed by the state Superior Court for San Francisco County is currently
9 operating the hotel and collecting the hotel room receipts.

10 11 MOTION FOR CHANGE OF VENUE

12 28 U.S.C. § 1408 provides that a case under title 11 may be commenced in the district in
13 which the debtor has its domicile, residence, principal place of business, or principal assets. Where
14 the original venue is proper, the Court will not transfer the case except in the interest of justice and
15 convenience of the parties. In re Melgar Enterprises, Inc., 140 Bankr. 43 (Bankr. E.D.N.Y.
16 1992)(citing In re Commonwealth Oil Refining Co., 596 F.2d 1239 (5th Cir. 1979). The transfer
17 requested in this case is an inter-division transfer and not one to another district. Parties to this case
18 are not significantly prejudiced by the debtor's choice of venue. The debtor's business records and the
19 locus of its decision-making are in San Jose. Most of its principals are in San Jose. The debtor's
20 exercise of business judgment in selecting the forum for this case will not be disturbed.

21 22 MOTION TO DISMISS

23 The factors relevant to a determination whether a case was filed in bad faith are set forth in In
24 re Little Creek, 779 F.2d 1068, 1073 (5th Cir. 1986). No one factor is determinative; a court must
25 look to the totality of circumstances to determine whether a case should be dismissed for bad faith
26 filing. In re Sarasota Plaza Assoc. Ltd. Partnership, 102 Bankr. 257, 259 (Bankr. M.D. Fla. 1989).
27 Neither filing a petition on the eve of foreclosure nor the inability to pay debt service are controlling
28 because these are factors common to most chapter 11 debtors. In re Marion Street Partnership, 108

1 Bankr. 218, 223 (Bankr. D. Minn. 1989). Also, single asset cases are not prohibited, even if filed in
2 close proximity to a foreclosure sale. In re Metro, Ltd., 108 Bankr. 684, 687 (Bankr. D. Minn.
3 1988). However, particularly significant factors are the debtor's intent or motive for filing the
4 petition, the extent to which the debtor is an ongoing concern, and the ability of the debtor to
5 reorganize. In re One Fourth, 105 Bankr. 106, 108 (Bankr. M.D. Fla. 1989). The debtor's property
6 in this case is valuable and generates significant cash flow with which to fund a plan of reorganization.

8 MOTION TO SEQUESTER CASH COLLATERAL

9 The determination of whether a perfected assignment of rents includes hotel room revenues
10 must be made by reference to state law. Butner v. U.S., 440 U.S. 48 (1979). Under California law,
11 hotel room revenues do not constitute rents. Financial Security Assurance, Inc. v. Days California
12 Riverside, L.P., 1992 U.S. Dist. LEXIS 17363 (E.D. Cal. Aug. 18, 1992)(citing People v. Minervini,
13 20 Cal.App.3d 832, 840 (1971)). Accord In re Northview, 130 Bankr. 543 (Bankr. 9th Cir. 1991).
14 Thus, they are not subject to an assignment of rents.

15 The crucial difference is that hotel guests are mere licensees with only a contractual right to
16 use the premises and no interest in the realty. Id. Since the relationship between an innkeeper and a
17 hotel guest is not that of landlord and tenant, fees paid for the use of hotel rooms cannot be deemed
18 rents. Id. Hotel room rates constitute payment for services rendered--namely, the provision of
19 temporary lodging and related amenities. Id. As such, hotel room revenues are classified as accounts
20 under California law subject to Article 9 rather than real property law. Id. Tenants, on the other
21 hand, pay rents to a landlord for the use, possession, and enjoyment of the premises. Id.

22 Because hotel room revenues do not constitute rents, New Horizons' deed of trusts and
23 assignment of rents do not cover the room revenues generated by the Gough-Hayes Hotel. New
24 Horizons has no right to cash collateral because it does not have a perfected security interest in the
25 debtor's hotel room revenues. See In re Tucson Industrial Partners, 129 Bankr. 614 (Bankr. 9th Cir.
26 1991). Therefore, it is not entitled to adequate protection under section 363 for the debtor's use of
27 the hotel room receipts.

28 MOTION FOR RELIEF FROM STAY

1 As an oversecured creditor, New Horizons is entitled to adequate protection if the value of
2 the property is declining. In re Timbers, 484 U.S. 365 (1988). The moving creditor has the burden
3 of proof on lack of equity, and the debtor has the burden on all other issues including adequate
4 protection and the absence of cause. In re Gauvin, 24 Bankr. 578 (Bankr. 9th Cir, 1982). Adequate
5 protection is tailored to the facts of each case. In re Deico Electronics, 139 B.R. 945 (Bankr. 9th
6 Cir. 1992). New Horizons is currently receiving \$10,000 per month, and the appraisals reflect that
7 the debtor has equity in the property. Therefore, New Horizons has failed to show that it is not
8 adequately protected. In re Mellor, (9th Cir.).

9 Under section 543, a state court receiver or a custodian must deliver to the debtor in
10 possession and account for property that came into the custodian's possession, custody, or control.

11 Whether a security interest perfected prepetition continues in postpetition hotel room
12 revenues is strictly an issue of statutory interpretation. Section 552(a) of the Bankruptcy Code
13 provides generally that property acquired by the debtor postpetition is not subject to any prepetition
14 liens. The scope of that section is limited by section 552(b), which creates an exception for
15 "proceeds, product, offspring, rents, or profits."
16 Section 552(a) allows debtors to gather assets into the estate to satisfy the claims of creditors. Days
17 California Riverside at 4. Section 552(b) balances this interest with the rights of secured creditors to
18 maintain their negotiated interest in the five types of collateral listed. *Id.*

19 None of the exceptions under section 552(b) applies to hotel room revenues. *Id.* As we have
20 just discussed, room revenues are not "rents." Nor are they "proceeds," which refer to revenues from
21 personal property secured prepetition which is converted into some other property. *Id.* Similarly,
22 "profits," "product," and "offspring" under the Bankruptcy Code do not contemplate hotel occupancy
23 revenues. *Id.* The omission of the term "accounts" under section 552(b) is significant. *Id.* The
24 conclusion is that a prepetition security interest in hotel room revenues does not continue postpetition
25 under section 552(b). *Id.*